IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

Writ Petition No. 1548 of 1993

Mahindra & Mahindra Ltd.
a Company incorporated under
the Companies Act 1956, and
having its registered office
at Gateway Building, Apollo
Bunder, Bombay 400 039 .. Petitioners.

V/s.

1. Union of India

2. Collector of Central Excise,
Bombay II, having his office
at Piramal Chambers, Parel,
Bombay - 400 012.

3. The Transport Commissioner,
State of Maharashtra,
Mittal Chamber, 1st Floor,
Nariman Point,
Bombay - 400 021.

4. The Transport Commissioner,
State of Gujarat.

5. The Transport Commissioner,
State of Karnataka

6. The Transport Commissioner,
State of Kerala,
Thiruanantha Puram .. Respondents.

With

Writ Petition No. 1974 of 1994

Mahindra & Mahindra Ltd.
a Company incorporated under
the Companies Act 1956, and
having its registered office
at Gateway Building, Apollo
Bunder, Bombay 400 039 .. Petitioners.

V/s.

1. Union of India

2. Assistant Collector of
Central Excise, Division VIII,
having his office at Samant
Estate, Takshashila Building,

Goregaon (East), Bombay 400 063

3. Superintendent of Central Excise,
Range I, Division VIII,
Bombay-II, Kandivli East,
Bombay 400 101 .. Respondents.

With

Writ Petition No. 517 of 1994
(CIVIL APPELLATE SIDE)

MAHINDRA & MAHINDRA LIMITED,
a Company incorporated under
the Companies Act 1956, and
having its registered office
at Gateway Building, Apollo
Bunder, Bombay 400 039 and
one of its factory at 81/89,
MIDC, Satpur, Nasik .. Petitioners.

V/s.

1. Union of India

2. Collector of Central Excise,
Aurangabad having his office
at P. Surana Complex,
Jafer Gate, Mondha Road,
Aurangabad

3. Superintendent of Central
Excise, Customs and Central
Excise Range "E", Nasik .. Respondents.

Mr. A.M. Setalwad, Sr. Counsel with Mr. Anil Wani with Mr. Mehul Shah and Mr. Sharad Abhyankar i/b. M/s. ANS Law Associates for the Petitioners

Mr. A.J. Rana, Sr. Counsel with Mr. P. Presswala with Mr. M.S. Sanklecha with Mr. H.V. Mehta for the Respondent Union of India and Excise Authorities.

Mr. Niranjan Pandit, AGP. for the Respondent-State of Maharashtra.

CORAM : S. RADHAKRISHNAN &
S.A. BOBDE, JJ.
DATED : 08.10.2004.

JUDGMENT (PER - S. RADHAKRISHNAN, J.) :-

1. In all the above three Petitions, common facts and

common issues are involved. Under these circumstances, we are disposing of all the above three Petitions by this common order. As far as Writ Petition No. 1548 of 1993 is concerned, the Petitioners are challenging the Show Cause Notice issued by the Collector of Central Excise, Bombay-II dated 27.4.1993 for the period April-1991 to November, 1991, whereas in Writ Petition No. 1974 of 1994 there are two show cause notices, being challenged by the Petitioners, being a notice dated 4.11.1993 for the period April-September, 1993 and the second notice dated 4.5.1994 for the period October 1993 -Februrary 1994. In the third Petition being Writ Petition No. 517 of 1994, the Petitioners are challenging the two Show Cause Notices dated 27/30.9.1993 for the period April-1991 to November, 1992 pertaining to Kandivli Factory and the second notice dated 4.11.1993 for the period April-September, 1993 pertaining to Nasik factory.

2. The Petitioners manufacture various types of motor vehicles. They have two factories, one is situated at Kandivli at Mumbai and the other is situated at Nasik. The common issue involved in all the three above Petitions is with regard to the classification of the aforesaid motor vehicles manufactured by the Petitioners. There are two models being Commander 750 DI Commander 650 DI. The Petitioners appear to have commenced manufacturing both the above models of Jeep, sometime in

January 1991 at their Nasik factory and in July 1991 at Kandivli factory. The above motor vehicles were also classified under the heading 87.02, which as it stood prior to 1.3.1992, apply to public transport type passenger vehicle. In this behalf, it would be relevant to quote the actual classification regarding the same, which is as under :-

CHAPTER 87
VEHICLES OTHER THAN RAILWAY OR TRAMWAY ROLLING-STOCK AND PARTS AND ACCESSORIES THEREOF

Notes :

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3. For the purpose of heading No. 87.02, the expression 'public-transport type passenger motor vehicles' means vehicles designed for the transport of ten persons or more (including the driver)

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Heading No.	Sub heading No.	Description of goods	Rate of duty
(1)	(2)	(3)	(4)
..	..	..	..
87.02	8702.00	Public-tranport type passenger motor vehicles	25%
87.03	8703.00	Motor cars and other motor vehicles principally designed for the transport of persons (other than those of heading No. 87.02), including station wagons and racing cars	60%

....

With effect from 1.3.1992, the same duty was modified as under:-

CHAPTER 87
VEHICLES OTHER THAN RAILWAY OR TRAMWAY ROLLING-STOCK AND PARTS AND ACCESSORIES THEREOF

Notes :

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Heading No.	Sub heading No.	Description of goods	Rate of duty
(1)	(2)	(3)	(4)
..	..	..	..
87.02	8702.00	Motor vehicles for the transport of ten or more persons, including the driver	25%
87.03	8703.00	Motor cars and other motor vehicles principally designed for the transport of persons (other than those of heading No. 87.02), including station wagons and racing cars	60%
..	..	..	..

3. In all the above Petitions, the Petitioners have basically challenged the Show Cause Notices issued by the Excise Department on the ground that ex-facie they are without jurisdiction, on the ground that the Show Cause Notices seek to classify the aforesaid ten seater motor vehicles under the heading 87.03, which covers all motor cars and other motor vehicles principally designed for transport of persons "other than those of 87.02" including station wagon and racing cars. Therefore, the

contention of the learned counsel for the Petitioners is that the vehicles manufactured by the Petitioners should be covered under the heading 87.02 wherein the duty is only 25%, whereas the duty under 87.03 would be 60%.

4. Shri Setalwad, the learned Senior counsel for the Petitioners sought to contend that the aforesaid Show Cause Notices are contrary to the earlier orders passed by the Excise Collector dated 16.6.1992, wherein the Excise Collector had dropped an earlier show cause notice dated 23/26.12.1991 against, which the Department had not preferred any Appeal. He also contended that the aforesaid Show Cause Notices are also contrary to the orders of the Collector, (Appeals) dated 23.6.1993, who rejected the Appeal filed by the Department, against the order of Assistant Commissioner dated 25.6.1991 approving the above classification of ten seater motor vehicles under the heading 87.02. He also emphasised that the Department's Appeal was also dismissed by the Tribunal by an order dated 29.9.2002.

5. Over and above, Shri Setalwad contended as far as Show Cause Notice dated 27.4.1993 in Writ Petition No. 1548 of 1993, the same is ex-facie time barred and as such un-sustainable, as there is no suppression of any fact, whatsoever, the same could not have been issued beyond the prescribed period of limitation. Similarly,

Shri Setalwad also contended that as far as notice dated 27/30.9.1993, which is challenged in Writ Petition No. 517 of 1994 is also ex-facie time barred and manifestly un-sustainable, as there is no suppression of any fact whatsoever.

6. Shri Setalwad, the learned Senior counsel referred to two judgments of the Supreme Court namely **Hindustan Steel Ltd. Vs. State of Orissa 1978 (2) E.L.T. J 159 (SC)** and another judgment of the Supreme Court in **CCE Vs. Chemphar Drugs Linements 1989 (40) E.L.T. 276 (SC)** for the proposition that no suppression can be alleged if the assessee had acted bonafide. That is to say, the contention is that the Petitioner had acted bonafide and referred upon the earlier orders of the Excise Department and as such it should not be construed as any suppression of any fact.

7. Shri Setalwad, the learned Senior counsel also referred to and relied on three judgments of Supreme Court in **P. & B. Pharmaceuticals (P) Ltd. v. CCE 2003 (153) E.L.T. 14 (SC)**, **E.C.E. Industries Ltd. v. CCE, Delhi (2004) (164) E.L.T. 236(SC) and Hyderabad Polymers (P) Ltd. v. CCE, Hyderabad, 2004 (166) E.L.T. 157 (SC)** for the submission that it is not permissible to allege suppression if an earlier Show Cause Notice on substantially same facts had been issued and determined

in favour of the assessee.

8. Shri Setalwad strongly denied that the allegations of the Excise Department that the Petitioners had submitted in-correct blue prints to Transport Commissioner in order to avoid the provisions and/or restriction laid down on the Transport category vehicle and deliberately misdeclared the vehicle to be "Omni bus" under "non-transport category" and therefore, deliberately and intentionally declared the facts to the Office of the Transport Commissioner and to the Excise Authorities. Shri Setalwad contended that the Petitioners had never relied upon the circular of the Transport Commissioner and did not submit it alongwith the classification list. The circular was only submitted at the request of the Assistant Collector of Excise. Shri Setalwad sought to contend that the statements, which were recorded in the aforesaid enquiry, would not come in the way of the Petitioners. Under these circumstances, Shri Setalwad contended that the Show Cause Notices are without jurisdiction. He has also referred to judgment of the Supreme Court in **Calcutta Discount Co. Ltd. v. ITO A.I.R. 1961 SC 372,** wherein the Supreme Court has observed the Courts would be failing in their duty if a relief is refused without adequate reasons. He also referred to a judgment of our High Court in **Tata Engineering & Locomotive Company Ltd. V. Union of India**

1991 (52) E.L.T. 500 in that behalf.

9. Under the aforesaid facts and circumstances, Shri Setalwad, strongly contended that as some of the notices are without jurisdiction and some of the notices which are clearly time barred, cannot be sustained, as there is no suppression of facts. Under these circumstances, the Petitioners have prayed for quashing of the aforesaid show cause notices in the above three Petitions.

10. Shri Rana, the learned Senior counsel appearing on behalf of the Respondent - Excise Department strongly contended that the Show Cause Notices referred to hereinabove contain various detailed annexures and documents to support the case of the Department and he contended that the Petitioners ought not to be permitted to agitate the same in this Court at the stage of Show Cause Notice and the Petitioners will be given a full opportunity before the concerned Authority to file their say and thereafter the matter would be decided on it’s own merits in accordance with law. Therefore, the contention of Shri Rana is that at the stage of the Show Cause notice, the matter ought not to be scuttled specially in view of the facts and circumstances involved in the above matter.

11. Shri Rana, the learned Senior counsel thereafter

referred to a recent judgment of the Supreme Court in **Commissioner of Customs & Central Excise and Others Vs. Charminar Nonwovens Ltd. (2004) 5 Supreme Court Cases 125,** wherein in paragraph 2 and 3 read as under:-

> 2. The respondent filed a writ petition before the High Court of Andhra Pradesh challenging this show-cause notice and the detention order. On an earlier occasion on similar adjudication, the Appellate Authority had upheld the claim of the assessee. The High Court proceeded on the basis that the appellate order had become final and expressing agreement with the same, quashed the notice. The argument on behalf of the appellant that if the view of the High Court is correct, a classification cannot be reviewed and any such classification once made cannot be reviewed even if the earlier view is erroneous, and such a course would result in great loss of revenue, was not accepted and their petition allowed and the show-cause notice quashed. Hence this appeal.
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> 3. The matter relating to commodity classification, whether it falls under one heading or the other or attracts higher or lower duty has to be decided on facts arising in each case. Even though the decision may have been taken earlier at one point of time but on further investigation/discovery of new fact or the law having changed, as is the stand in the present case, the matter has to be re-examined. It is not at all proper for the High Court to interfere in such matters at the stage of issue of the show-cause notice. We, therefore, set aside the order made by the High Court and remit the matter to the authority concerned for adjudication. It shall be open to the respondent to file reply to the show-cause notice as it deems fit, if not already filed within a period of one month from today or such further time as may be allowed by the adjudicating authority. We direct the adjudicating authority to dispose of the matter thereafter in accordance with law.

12. Shri Rana, thereafter referred to another recent judgment of the Supreme Court in **Special Director Vs. Mohd. Ghulam Ghouse 2004 (164) E.L.T. 141 (S.C.)** and he

strongly relied on paragraph 5, which reads as under:-

> 5. This Court in a large number of cases has deprecated the practice of the High Courts entertaining writ petitions questioning legality of the show cause notices stalling enquiries as proposed and retarding investigative process to find actual facts with the participation and in the presence of the parties. Unless, the High Court is satisfied that the show cause notice was totally **non est** in the eye of law for absolute want of jurisdiction of the authority to even investigate into facts, writ petitions should not be entertained for the mere asking and as a matter of routine and the writ petitioner should invariably be directed to respond to the show cause notice and take all stands highlighted in the writ petition. Whether the show cause notice was founded on any legal premises is a jurisdictional issue which can even be urged by the recipient of the notice and such issues also can be adjudicated by the authority issuing the very notice initially, before the aggrieved could approach the Court. Further, when the Court passes an interim order it should be careful to see that the statutory functionaries specially and specifically constituted for the purpose are not denuded of powers and authority to initially decide the matter and ensure that ultimate relief which may or may not be finally granted in the writ petition is accorded to the writ petitioner even at the threshold by the interim protection, granted.

13. Shri Rana, the learned Senior counsel thereafter referred to another judgment of the Supreme Court in **Malldi Drugs & Pharma Ltd. Vs. Union of India 2004 (166) E.L.T. 153(S.C.)**, wherein the Supreme Court has held that the High Court was absolutely right in dismissing the Writ Petition against a mere show cause notice. Shri Rana also referred to another judgment of the Supreme Court in **Union of India Vs. Hindustan Development Corporation Ltd. 1998 (100) E.L.T. 14 (S.C.)**, wherein also the Supreme Court has clearly held

that Writ Jurisdiction is not exercisable at show cause notice for investigating facts of classification dispute, the High Court should not undertake the onerous duty of adjudicating upon these questions which were required to be decided on merits by the authorities themselves.

14. Shri Rana sought to contend that merely on an earlier occasion, the Excise Department might have accepted certain classification, does not prevent the Excise Department from subsequently modifying the same. Therefore, his contention is that if this was not allowed to be done, then the Excise Department once wrongly classified a product, it will never be able to set right the same.

15. Shri Rana, the learned senior counsel contended that as far as suppression of facts are concerned with regard to the notice involved in Writ Petition No. 1548 of 1993 being Show Cause Notice dated 27.4.1993 and also the show cause notice dated 27/30.9.1993 in Writ Petition No. 517 of 1994 is concerned, the Petitioners are not producing the correct blue prints before the Excise Authorities regarding the capability of the aforesaid two vehicles to really carry 10 persons, Shri Rana also brought to our notice from the record, that the same does not indicate any clear blue print regarding the exact size of the vehicle and the size of the seats and methods of seating

etc. Even the observation of the Transport Commissioner only indicates that they were able to squeeze in 10 persons in those vehicles, that would not be a proper course, as it is not shown that the vehicle is capable of holding ten persons with proper seat sizes and a proper gap between the front and back row etc. All these facts can only be looked into by the concerned Authority, after scrutiny of correct blue prints, design sheets, documents that may be produced by the Petitioner at the time of the hearing. Under the circumstances, Shri Rana contended that this Court ought not to entertain the Petition at this Show Cause Notice stage.

16. Having heard both the learned counsel, we find from the record in all the above three Petitions, they are all at the Show Cause Notices stage. Over and above, merely because earlier the Excise Department had accepted a certain classification, does not mean that the Excise Department can not later, based on material find that the classification ought to be under a different heading. The above judgments of the Supreme Court cited by Shri Rana, the learned senior counsel for the Respondents make it abundantly clear, that it would be un-safe for the High Court to exercise jurisdiction under Article 226 of the Constitution of India, especially at the Show Cause Notice stage. No prejudice will be caused to the Petitioners at this stage, since the Petitioners will

have to only show cause to the aforesaid Notices and justify the concerned authorities by producing appropriate material. As far as the issue of want of jurisdiction is concerned the said issue could be easily agitated before the concerned authorities as has been held by the Supreme Court in **Special Director V/s. Mohd. Ghulam Ghouse 2004 (164) E.L.T. (S.C.) (supra)**. As far as suppression of facts are concerned, even before us the relevant blue prints, design sheets etc. with regard to the actual size of seats and the manner of placing them in the vehicles were not produced. Therefore, we cannot fault the Respondents in their contention of suppression of facts. Under these circumstances, we are not inclined to interfere in all the above three Petitioners, hence Rule granted in all the above three Petitions stand discharged with costs. Shri Rana, learned senior counsel fairly stated that the Respondents will give a fair hearing to the Petitioners either at Mumbai or Nasik as per their choice.

17. Shri Setalwad, the learned Senior counsel for the Petitioner prayed for stay of this order for a period of twelve weeks from today and states that the Petitioners may be permitted to file their Reply to the aforesaid Show Cause Notices within the aforesaid period of twelve weeks. We grant a stay of this order for a period of twelve weeks from today, and permit the Petitioners to

file their Replies to the Show Cause Notices mentioned hereinabove, within a period of twelve weeks from today.

18. Issuance of Certified Copy expedited.

(S. RADHAKRISHNAN, J.)

(S.A. BOBDE, J.)